



Guantanamo Detention Center: Legislative Activity in the 111th Congress

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Summary

The detention of alleged enemy belligerents at the U.S. Naval Station in Guantanamo Bay, Cuba, together with proposals to transfer some such individuals to the United States for prosecution or continued detention, has been a subject of considerable interest for Congress. Several authorization and appropriations measures enacted during the 111th Congress, along with various pending bills, address the disposition and treatment of Guantanamo detainees.

To date in the 111th Congress, provisions directly relating to Guantanamo detainees have been enacted as part of eight laws: the 2009 Supplemental Appropriations Act (P.L. 111-32); the Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83); the 2010 National Defense Authorization Act (P.L. 111-84); the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (P.L. 111-88); the Consolidated Appropriations Act, 2010 (P.L. 111-117); the Department of Defense Appropriations Act, 2010 (P.L. 111-118); the Supplemental Appropriations Act, 2010 (P.L. 111-212) and the Intelligence Authorization Act for FY2010 (P.L. 111-259). Most of these measures impose general restrictions on the use or availability of funds to transfer or release Guantanamo detainees into the United States, though they also provide an exception permitting transfers for purposes of criminal prosecution or detention during legal proceedings if certain reporting requirements are fulfilled. Although the 2010 fiscal year has ended, Congress has passed continuing resolutions that extended funding for federal agencies at the FY2010 enacted spending levels first through December 3, 2010 (P.L. 111-242), and then through December 18, 2010 (P.L. 111-290).

The Full-Year Continuing Appropriations Act, 2011 (H.R. 3082), which was agreed to by the House on December 8, 2010, would prohibit any funds made available under it or any prior act from being used to transfer or release a Guantanamo detainee into the United States, its territories, or possessions. It would also bar funds provided to the Department of Justice from being used to acquire any facility for use in detaining any person who was held at Guantanamo as of June 24, 2009. The FY2011 defense authorization measures—S. 3454 and the House-passed H.R. 5136—would also extend or expand restrictions on detainee transfers. The House-passed Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2011 (H.R. 5822), would bar the funds it appropriates or makes available from being used to renovate or construct a facility within the continental United States to house Guantanamo detainees.

Public laws and pending proposals address additional issues related to the treatment and disposition of Guantanamo detainees. For example, Title XVIII of the FY2010 National Defense Authorization Act establishes new procedures for military commissions. Section 552 of the FY2010 Department of Homeland Security Act requires that former Guantanamo detainees be included on the “No Fly List” in most circumstances and restricts their access to immigration benefits.

This report analyzes relevant provisions in enacted legislation and selected pending bills. For more detailed explorations of the legal issues related to the potential closure of the detention facility and the transfer, release, and treatment of detainees, see CRS Report R40139, *Closing the Guantanamo Detention Center: Legal Issues*, by Michael John Garcia et al., and CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea and Michael John Garcia.

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Introduction

Prompted in part by proposals to close the detention facility or transfer detainees to the United States, the continued detention of alleged enemy combatants at the U.S. Naval Station in Guantanamo Bay, Cuba, has been a subject of considerable interest during the 111th Congress. Six enacted measures contain provisions that directly restrict the transfer or release of Guantanamo detainees, particularly into the United States. Many of the restrictions applied only to funds appropriated during the 2010 fiscal year. However, through continuing appropriations resolutions, Congress temporarily extended conditions imposed by FY2010 appropriations measures through December 18, 2010.¹ Pending bills, including the House-passed Full-Year Continuing Appropriations Act, 2011 (H.R. 3082), contain provisions that would extend or expand such restrictions.

This report surveys provisions restricting transfer, together with other provisions enacted or pending in the 111th Congress relating to Guantanamo detainees. For more detailed explorations of the legal issues related to the potential closure of the detention facility or the transfer, release, and treatment of detainees, see CRS Report R40139, *Closing the Guantanamo Detention Center: Legal Issues*, by Michael John Garcia et al., and CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea and Michael John Garcia.

Background

In 2001, Congress authorized the President's use of "all necessary and appropriate force" against those responsible for the 9/11 terrorist attacks.² Pursuant to that authority, the United States has captured suspected al Qaeda and Taliban members and detained them at several locations, including Guantanamo. Most of the 779 persons detained at Guantanamo at some point during post-9/11 military operations have been transferred to a foreign government for continued detention or release. As of November 4, 2010, 174 detainees continue to be held at the facility.³ A number of issues concerning the remaining detainees are unsettled. In some instances, the United States has encountered difficulties repatriating or resettling Guantanamo detainees who are no longer believed to be enemy belligerents, either because it has been unable to find a country willing to accept them, or because of concerns that a detainee would face torture if transferred to a particular country.⁴ Other issues have arisen concerning whether to try certain detainees for

¹ Continuing Appropriations Act, 2011 (P.L. 111-242) (extending funding for federal agencies at FY2010 levels through December 3, 2010); P.L. 111-290 (further extending funding through December 18, 2010).

² Authorization to Use Military Force, P.L. 107-40 (2001). The authority applies to "nations, organizations, or persons" who "planned, authorized, committed, or aided the terrorist attacks" and to people who harbored the perpetrators of the attacks.

³ For tracking information regarding the Guantanamo detainee population, see Andrei Scheinkman et al., "The Guantanamo Docket," *New York Times*, <http://projects.nytimes.com/guantanamo>.

⁴ The most well-known example of this situation involves several current or former Guantanamo detainees belonging to the ethnic Uighur minority in China. Although these detainees were cleared of enemy belligerency status, they were not repatriated to China because of concerns that they might face torture there. In light of U.S. difficulties in finding a third country willing to resettle the detainees, several Uighurs brought suit seeking to be released into the United States. Although a federal *habeas* court initially ordered their release into the country, this ruling was reversed by the U.S. Court of Appeals for the D.C. Circuit, which held that *habeas* courts lack authority (absent the enactment of an authorizing statute) to compel the transfer of a non-citizen detainee into the United States, even if that detainee is found (continued...)

criminal offenses in either military or civilian courts, or whether some detainees may lawfully be held for the duration of the conflict with al Qaeda and the Taliban so as to prevent their return to hostilities.⁵

Since its inception, the policy of detaining suspected belligerents at Guantanamo has been the subject of controversy. Shortly after taking office, President Barack Obama issued three executive orders affecting U.S. policy towards Guantanamo detainees. Most notably, Executive Order 13492 called for the Guantanamo detention facility to be closed as soon as practicable, and no later than January 22, 2010.⁶ It also ordered an immediate review of each detainee's status by a special task force and temporarily halted all proceedings before military commissions.⁷ Although the order's deadline for the closure of the Guantanamo detention facility has not been met, the Obama Administration has stated that it remains committed to closing the facility as expeditiously as possible. Military commission proceedings for some Guantanamo detainees charged with war crimes have also resumed.

Two additional executive orders addressed overall wartime detention policy. One limited the methods for interrogating persons in U.S. custody (as part of any armed conflict) to those listed in the Army Field Manual on Human Intelligence Collector Operations, although it provides an exception for interrogations by the Federal Bureau of Investigation (FBI), stating that the FBI may "continu[e] to use authorized, non-coercive techniques of interrogation that are designed to elicit voluntary statements and do not involve the use of force, threats, or promises."⁸ Another executive order established the Special Task Force on Detainee Disposition, tasked with "identif[ying] lawful options" for the disposition of Guantanamo detainees and others captured by the United States.⁹ Because executive orders can be revoked or modified by subsequent

(...continued)

to be unlawfully held and the government has been unable to effectuate his release to a foreign county. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009). The Supreme Court thereafter granted certiorari to review the circuit court's decision, but before arguments in the case were heard, the countries of Switzerland and Palau agreed to accept the remaining Uighur detainees in U.S. custody. The Supreme Court vacated the appellate court's decision and remanded the case back to the circuit court for reconsideration in light of the changed circumstances. 130 S. Ct. 1235 (2010). The D.C. Circuit thereafter reinstated its earlier decision, as modified to take into account subsequent congressional enactments limiting the use of funds to release any Guantanamo detainee into the United States. 605 F.3d 1046 (D.C. 2010), *petition for en banc rehearing denied*, Sept. 9, 2010. Five Uighur detainees remain at Guantanamo, having thus far refused offers for resettlement. It remains to be seen whether the D.C. Circuit's ruling will be reviewed by the Supreme Court.

⁵ For more detailed background information and an analysis of legal issues implicated by the potential closure of Guantanamo, see CRS Report R40139, *Closing the Guantanamo Detention Center: Legal Issues*, by Michael John Garcia et al.

⁶ Executive Order 13492, *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*, 74 Fed. Reg. 4897–4900 (Jan. 27, 2009).

⁷ *Id.* Congress enacted the Military Commissions Act of 2006 (MCA), P.L. 109-366, to authorize the President to convene military commissions to prosecute "alien unlawful enemy combatants." The act exempted the new military commissions from several requirements, codified in the Uniform Code of Military Justice, that would have otherwise applied. For a detailed analysis of the military commissions created pursuant to the Military Commissions Act, see CRS Report RL33688, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*, by Jennifer K. Elsea. In 2009, the military commission system established by the MCA was revised pursuant to the Military Commissions Act of 2009, Title XVIII of P.L. 111-84 (discussed *infra*).

⁸ Executive Order 13491, *Ensuring Lawful Interrogations*, 74 Fed. Reg. 4893–4896 (Jan. 27, 2009); Dept. of the Army Field Manual 2-22.3 (FM 34-52), *Human Intelligence Collector Operations* (2006), available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/armyfm2223humanintel.pdf>.

⁹ Executive Order 13493, *Review of Detention Policy Options*, 74 Fed. Reg. 4901–4902 (Jan. 27, 2009).

presidential directives, legislation would be necessary to make the President's policies permanent. Likewise, Congress may reverse or adjust the approach of the executive orders by statute in any area in which it has the authority to act.

Key issues implicated by the potential closure of the Guantanamo detention facility include the transfer or release of detainees and procedures for prosecuting them or assessing their enemy belligerency status. Some Members of Congress have noted that issues related to the disposition of the remaining detainees complicate any legislative actions to fund, mandate, or prohibit closure of the detention facility. For example, when introducing a bill proposing a timeline for closure of the facility, Senator Dianne Feinstein noted that "the hard part about closing Guantanamo is not deciding to go do it; it is figuring out what to do with the remaining detainees."¹⁰ Thus, much of the legislative activity related to Guantanamo has focused on the transfer, release, and treatment of detainees.

Proposed transfers to the United States have garnered particular attention. In November 2009, the U.S. Department of Justice announced that five Guantanamo detainees would be transferred to New York for prosecution for criminal offenses related to the 9/11 terrorist attacks.¹¹ In December 2009, the President issued a memorandum directing the acquisition of the Thomson Correctional Center, a maximum-security facility in Illinois, so that designated Guantanamo detainees could be transferred there for continued detention.¹² The implementation of these proposals is reportedly on hold, with alternative approaches being developed.¹³

Enacted Laws

To date in the 111th Congress, provisions relating to Guantanamo detainees have been enacted as part of eight laws. Six of these measures limit the use of funds to transfer or release Guantanamo detainees in the United States: the 2009 Supplemental Appropriations Act (P.L. 111-32); the Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83); the 2010 National Defense Authorization Act (P.L. 111-84); the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (P.L. 111-88); the Consolidated Appropriations Act, 2010 (P.L. 111-117); and the Department of Defense Appropriations Act, 2010 (P.L. 111-118). The 2009 Supplemental Act was the first measure enacted into law, and although subsequently enacted measures have differed slightly in scope, they have all included similar restrictions on the transfer and release of Guantanamo detainees as those developed during conference committee deliberations for the 2009 Supplemental.¹⁴ Further, the National Defense Authorization Act and the Homeland Security Appropriations Act each contain Guantanamo-related provisions in

¹⁰ 155 Cong. Rec. S157 (daily ed. Jan. 7, 2009) (statement of Sen. Feinstein).

¹¹ Dept. of Justice, *Attorney General Announces Forum Decisions for Guantanamo Detainees* (Nov. 13, 2009), <http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html>.

¹² Presidential Memorandum, *Closure of [Detention] Facilities at the Guantanamo Bay Naval Base* (Dec. 15, 2009), <http://www.whitehouse.gov/the-press-office/presidential-memorandum-closure-dentention-facilities-guantanamo-bay-naval-base>.

¹³ See, e.g., Charlie Savage, *White House Delays 9/11 Trial Location Decision*, Pittsburgh Post-Gazette (Mar. 6, 2010), at A1; Jonathan Weisman and Evan Perez, *Deal Near on Gitmo, Trials for Detainees*, Wall St. J. (eastern ed.) (Mar 19, 2010), at A1. See also U.S. Congress, House Committee on the Judiciary, *The Justice Department*, (statement by Attorney General Eric Holder during questioning), 111th Cong., 2nd sess., May 13, 2010 (stating that the Justice Department was reviewing its decision to transfer certain detainees to New York for prosecution).

¹⁴ See H.Rept. 111-151.

addition to those restricting detainees' transfer or release. Two other measures enacted in the 111th Congress, the Supplemental Appropriations Act, 2010 (P.L. 111-212), and the Intelligence Authorization Act for FY2010 (P.L. 111-259), do not contain provisions directly affecting Guantanamo detainees, but do require the Executive to supply certain information to Congress or the public that pertains to such persons.

Congress did not enact any FY2011 regular appropriations acts by the end of the 2010 fiscal year. Instead, Congress passed and President Obama signed the Continuing Appropriations Act, 2011 (H.R. 3081), on September 30, 2010. The act generally extends funding for federal agencies at the FY2010 enacted spending levels through December 3, 2010, under the authority and conditions provided for under those FY2010 appropriations acts. Congress thereafter amended the act to extend funding through December 18, 2010 (P.L. 111-290). Accordingly, restrictions imposed by FY2010 appropriations measures on the use of funds for the transfer and release of Guantanamo detainees remain in place.

Restrictions on Transfer and Release

Six measures enacted to date in the 111th Congress prohibit or place conditions on the use of federal funds to release or transfer Guantanamo detainees into the United States. Such measures may be prompted by perceived security risks that some argue could arise if suspected terrorists were brought to the United States.¹⁵ The enactments also provide reporting requirements that must be satisfied before a detainee may be transferred or released to a foreign country.

Restrictions on the Use of Funds to Release Detainees into the United States

Each of the six measures bans the use of funds to release Guantanamo detainees into the United States. The 2009 Supplemental Act banned the use of funds appropriated under that or previous acts to release any Guantanamo detainee into the continental United States, Hawaii, or Alaska.¹⁶ Section 1041 of the National Defense Authorization Act prohibits the U.S. Department of Defense from using funds authorized to be appropriated to it by that act or otherwise available to the department to release a Guantanamo detainee into the United States or its territories or possessions during the period beginning October 1, 2009, and ending December 31, 2010.¹⁷ The other four measures similarly prohibit the use of federal funds—particularly those appropriated during the 2010 fiscal year—to release a Guantanamo detainee into the United States or specified territories.¹⁸

¹⁵ See, e.g., Press release, Rep. J. Randy Forbes, *Members Introduce Bill to Prevent Transfer of Terrorists to Virginia Prisons* (Mar. 2, 2009), available at <http://forbes.house.gov/News/DocumentSingle.aspx?DocumentID=113008>.

¹⁶ P.L. 111-32, § 14103(a).

¹⁷ P.L. 111-84, § 1041(a).

¹⁸ P.L. 111-83, § 552(a); P.L. 111-88, § 428(a); P.L. 111-117, § 532(a); P.L. 111-118, § 9011(a). The acts specifically enumerate the territories of Guam, American Samoa, the United States Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands. For an explanation regarding the funds to which the restrictions apply, see *infra* note 35 and accompanying text.

Restrictions and Reporting Requirements Relating to Transfers to the United States¹⁹

Six measures enacted in the 111th Congress place restrictions on the transfer of Guantanamo detainees into the United States, including requiring the President to fulfill a reporting requirement 45 days prior to effecting the transfer.²⁰ Most of these measures permit the use of funds to enable the transfer of detainees only for purposes of prosecution or detention during legal proceedings,²¹ subject to certain reporting requirements being met. In contrast, the 2010 National Defense Authorization Act appears to authorize the transfer of detainees for *any* purpose other than for release, but like the other enacted measures, it only permits funds to be used to effectuate the transfer of detainees if certain reporting requirements are met.²²

While the 45-day reporting requirements in the measures described above are nearly identical, there are a few differences. The 2009 Supplemental Appropriations Act, the first measure to be enacted, required the President to submit a classified report to Congress concerning the proposed transfer of an individual to the United States that would, at minimum, contain (1) “findings of an analysis regarding any risk to the national security of the United States that is posed by the transfer”; (2) “costs associated with transferring the individual”; (3) “[t]he legal rationale and associated court demands for transfer”; (4) “[a] plan for mitigation of any risk” posed by the transferee to the national security of the United States; and (5) “[a] copy of a notification to the Governor of the State to which the individual will be transferred ... with a certification by the Attorney General of the United States in classified form at least 14 days prior to such transfer (together with supporting documentation and justification) that the individual poses little or no security risk to the United States.”²³

The reporting requirements relating to detainee transfers that are contained in the 2010 National Defense Authorization Act are slightly different, and arguably contemplate a greater degree of participation by state government officials in federal decisions to transfer detainees to a particular

¹⁹ See also **Table A-1** in the **Appendix** to this report.

²⁰ The text of the relevant provisions makes clear that the use of funds is restricted “until 45 days *after*” (emphasis added) the report has been submitted to Congress. See P.L. 111-32, § 14103(c); P.L. 111-83, § 552(c); P.L. 111-84, § 1041(b); P.L. 111-88, § 428(c); P.L. 111-117, § 532(c); P.L. 111-118, § 9011(c). When making the announcement that five detainees would be transferred to New York for prosecution, the Attorney General acknowledged that the requirements would need to be fulfilled before the detainees could be transferred to New York. See U.S. Department of Justice, *Attorney General Announces Forum Decisions for Guantanamo Detainees* (Nov. 13, 2009), <http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html> (noting that the “detainees will not be transferred to the United States for prosecution until all legal requirements are satisfied, including those in recent legislation requiring a 45 day notice and report to the Congress”).

²¹ P.L. 111-32, § 14103(c); P.L. 111-83, § 552(c); P.L. 111-88, § 428(c); P.L. 111-117, § 532(c); P.L. 111-118, § 9011(c). Because the phrase “legal proceedings” is not defined in the acts or discussed in any detail in the legislative history, it is unclear what it encompasses. P.L. 111-32 was the first measure in which the phrase “for the purposes of prosecuting such individual, or detaining such individual during legal proceedings” appears. The conference report for that act states that the agreed-upon language “prohibits current detainees from being transferred to the U.S., except to be prosecuted,” H.Rept. 111-151 at 141, which suggests a narrow meaning of the phrase. An alternative argument might be that the phrase “legal proceedings” arguably extends to non-prosecution proceedings such as resolution of petitions for *habeas corpus* relief.

²² P.L. 111-84, § 1041(b)-(c).

²³ P.L. 111-32, § 14103(d). After the 2009 Supplemental Appropriations Act was enacted, the President assigned respective reporting functions required by that act to the Attorney General, Director of National Intelligence, and Secretary of State. Presidential Memorandum, *Assignment of Reporting Functions Under the Supplemental Appropriations Act, 2009*, 74 Fed. Reg. 35765 (Jul. 21, 2009).

location. Specifically, the act requires the President, 45 days prior to the transfer of a detainee to the United States, to provide congressional defense committees a classified report which contains (1) “an assessment of the risk that the [detainee] poses to the national security of the United States, its territories, or possessions”; (2) a proposal for the disposition of each detainee; (3) a plan to mitigate any identified national security risks; (4) the proposed transfer location; (5) information regarding costs associated with the transfer; (6) a “summary” of a “consultation” required to take place with the local jurisdiction’s chief executive; and (7) “a certification by the Attorney General that under the plan the individual poses little or no security risk to the United States, its territories, or possessions.”²⁴ The sixth component of the classified report refers to a separate requirement in the 2010 National Defense Authorization Act that the President “consult with the chief executive” of the jurisdiction that is the proposed location of transfer.²⁵ It appears to contemplate a somewhat greater degree of involvement by state governors in detainee transfer decisions than the 2009 Supplemental Appropriations Act, which only required a certification that a governor had been “notified” regarding a transfer.

In all of the other measures containing reporting requirements with respect to the transfer of detainees into the United States, the components of the 45-day reports are identical and include some information required by the 2009 Supplemental and the FY2010 Defense Authorization Acts.²⁶ The components include (1) “[a] determination of the risk that the individual might instigate an act of terrorism within the continental United States, Alaska, Hawaii, the District of Columbia, or the United States territories if the individual were so transferred”; (2) “[a] determination of the risk that the individual might advocate, coerce, or incite violent extremism, ideologically motivated criminal activity, or acts of terrorism, among inmate populations at incarceration facilities ...”; (3) “costs associated with transferring the individual in question”; (4) “[t]he legal rationale and associated court demands for transfer”; (5) “[a] plan for mitigation of any risks described [in the first, second, or seventh components]”; (6) “[a] copy of a notification to the Governor of the State to which the individual will be transferred ... with a certification by the Attorney General of the United States in classified form at least 14 days prior to such transfer (together with supporting documentation and justification) that the individual poses little or no security risk to the United States”; and (7) “an assessment of any risk to the national security of the United States or its citizens, including members of the Armed Services of the United States, that is posed by such transfer and the actions taken to mitigate such risk.”²⁷

²⁴ P.L. 111-84, § 1041(c). On November 30, 2009, the President assigned reporting functions required by the 2010 National Defense Authorization to the Secretary of State, Secretary of Defense, and the Attorney General. Presidential Memorandum, *Assignment of Functions Under the National Defense Authorization Act for Fiscal Year 2010; the Department of Homeland Security Appropriations Act, 2010; and the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010*, 74 Fed. Reg. 63059 (Nov. 30, 2009).

²⁵ P.L. 111-84, § 1041(d).

²⁶ Most of the enactments contain provisions which provide that reports shall be submitted “to Congress” or “to the Congress,” without specifying individual Members or committees. P.L. 111-32, § 14103(d); P.L. 111-83, § 552(d); P.L. 111-88, § 428(d); P.L. 111-117, § 532(d); P.L. 111-118, § 9011(d). Those general phrases have been interpreted to refer to the committees of jurisdiction. Thus, reports submitted to the clerk of the House and Senate would likely be given to committees deemed to have jurisdiction over the underlying legislation or subject matter. For more information regarding the jurisdiction of congressional committees, see CRS Report 98-175, *House Committee Jurisdiction and Referral: Rules and Practice*, by Judy Schneider. See also Rules of the House of Representatives, Rule X; Rules of the Senate, Rule XXV.

²⁷ P.L. 111-83, § 552(d); P.L. 111-88, § 428(d); P.L. 111-117, § 532(d); P.L. 111-118, § 9011(d). The President has assigned reporting functions required under the 2010 Homeland Security Appropriations Act and the 2010 Department of Interior, Environment, and Related Agencies Appropriations Act to the Secretary of State, Secretary of Defense, and Attorney General. Presidential Memorandum, *supra* footnote 24.

The geographic applications of the 2009 Supplemental Act and the FY2010 Defense Authorization Acts also differ from the other relevant FY2010 measures. The 2009 Supplemental Act appears to only restrict transfers into the United States.²⁸ In contrast, the 2010 National Defense Authorization Act restriction includes all U.S. “territories or possessions.”²⁹ Each of the other relevant enactments explicitly applies to the United States and all of its territories, namely Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.³⁰ However, they do not appear to apply to other U.S. possessions.³¹

Reporting Requirements Concerning Release or Transfer of Detainees to Other Countries

Five of the measures enacted during the 111th Congress make the use of funds to effectuate the transfer or release of a Guantanamo detainee to a foreign state contingent upon certain reporting requirements being met. The FY2010 Homeland Security Appropriations, Interior Appropriations, Consolidated Appropriations, and Defense Appropriations acts each contain provisions that restrict the use of appropriated funds to transfer or release a Guantanamo detainee to another country or any “freely associated state.”³² The restrictions apply unless the President, 15 days prior to a proposed transfer or release, submits the following information in classified form: (1) the name of the detainee and the country or freely associated state to which he will be transferred; (2) an assessment of the risk to national security or U.S. citizens posed by the transfer or release; and (3) the terms of any agreement with the country or freely associated state that has agreed to accept the detainee.³³ The 2009 Supplemental Appropriations Act contains a provision that is similar except that it does not specify its application to freely associated states.³⁴

General Reporting Requirements to Congress

In addition to establishing reporting requirements relating to the transfer and release of Guantanamo detainees, several measures enacted in the 111th Congress establish more general reporting requirements relating to the Guantanamo detention facility. Several of the enacted laws establish general reporting requirements which direct the Executive to report on the status of Guantanamo detainees. Section 319 of the Supplemental Appropriations Act, 2009 (P.L. 111-32), requires the President to submit reports on the Guantanamo “prisoner population” to specified Members³⁵ of Congress within 60 days of the legislation’s enactment and every 90 days

²⁸ P.L. 111-32, § 14103(b) (restricting transfers to the continental United States, Alaska, Hawaii, and the District of Columbia).

²⁹ P.L. 111-84, § 1041(b).

³⁰ P.L. 111-83, § 552(c); P.L. 111-88, § 428(c); P.L. 111-117, § 532(c); P.L. 111-118, § 9011(c).

³¹ U.S. possessions not enumerated in the acts include, for example, Baker Island and other island possessions.

³² The acts include the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau within their definition of “freely associated states.”

³³ P.L. 111-83, § 552(e); P.L. 111-88, § 428(e); P.L. 111-117, § 532(e); P.L. 111-118, § 9011(e).

³⁴ P.L. 111-32, § 14103(e) (imposing restrictions on the transfer of a detainee to “the country of such individual’s nationality or last habitual residence or to any other country other than the United States”).

³⁵ Members to whom the report must be submitted include

(1) The majority leader and minority leader of the Senate; (2) The Chairman and Ranking Member on the Committee on Armed Services of the Senate; (3) The Chairman and Vice Chairman of the (continued...)

thereafter. The reports must provide the following information with respect to each detainee: (1) the detainee's name and country of origin; (2) a "summary of the evidence, intelligence, and information used to justify" his detention; and (3) a "current accounting of all the measures taken to transfer" him to his home or another country. In addition, the reports must state the "number of individuals released or transferred from detention ... who are confirmed or suspected of returning to terrorist activities after release or transfer" and provide "an assessment of any efforts by al Qaeda to recruit detainees released from detention." The initial report (which was to be completed within 60 days of the legislation's enactment) was required to address several additional matters, including (1) a "description of the process that was previously used for screening the detainees" who have been released and are confirmed or suspected of returning to terrorist activities; (2) "[a]n assessment of the adequacy of that screening process for reducing the risk that detainees previously released or transferred ... would return to terrorist activities after [their] release or transfer"; and (3) "[a]n assessment of lessons learned from previous releases and transfers of individuals who returned to terrorist activities for reducing the risk that detainees released or transferred ... will return to terrorist activities after their release or transfer."³⁶

In addition, five enactments establish reporting requirements that must be satisfied before the Executive may cease operations at the Guantanamo detention center. Specifically, they require the President, before "the termination of detention operations" at the detention facility, to submit a classified report to Congress that "describ[es] the disposition or legal status of each individual detained at the facility as of the date of [the relevant act's] enactment."³⁷ They do not specify the level of detail that the report must include with respect to each detainee, nor do they appear to require any particular length of time between the submission of the report and closure of the facility.

The Supplemental Appropriations Act, 2010 (P.L. 111-212), requires the Director of National Intelligence, not later than 45 days after the enactment of the bill, to fully inform the congressional intelligence committees regarding disposition decisions and threat assessments for Guantanamo detainees that were reached by the Guantanamo Review Task Force established by Executive Order 13492.³⁸ The Director of National Intelligence is further required to submit information to the congressional intelligence committees in the future regarding any new threat assessments made by the intelligence community regarding a particular Guantanamo detainee, along with access to the intelligence forming the basis for that assessment.³⁹

(...continued)

Select Committee on Intelligence of the Senate; (4) The Chairman and Vice Chairman of the Committee on Appropriations of the Senate; (5) The Speaker of the House of Representatives; (6) The minority leader of the House of Representatives; (7) The Chairman and Ranking Member on the Committee on Armed Services of the House of Representatives; (8) The Chairman and Vice Chairman of the Permanent Select Committee on Intelligence of the House of Representatives; and (9) The Chairman and Ranking Member of the Committee on Appropriations of the House of Representatives.

³⁶ P.L. 111-32, § 319.

³⁷ *Id.* at § 14103(f); P.L. 111-83, § 552(h); P.L. 111-88, § 428(g), P.L. 111-117, § 532(h); P.L. 111-118, § 9011(g).

³⁸ P.L. 111-212, § 3011(a).

³⁹ *Id.* at, § 3011(a).

Time Frames and Concurrent Application of Measures Restricting Use or Availability of Funds

For funds appropriated during FY2010, several of the reporting requirements probably apply concurrently. It is likely that the acts will be interpreted so as to avoid a conclusion that a later-enacted provision implicitly repeals an earlier provision.⁴⁰ Thus, to the extent that differing reporting requirements apply to the same committee, they would presumably be read as having a cumulative effect. In other words, it is likely that the Executive will submit one or more reports to the committee(s) of jurisdiction which fulfill all applicable requirements.

The restrictions vary in scope and applicable time frames. Restrictions in the Supplemental Appropriations Act, 2009, applied only to funds appropriated by that or any prior act; although a later measure temporarily extended their application through October 31, 2009, they do not appear to apply to later appropriated funds.⁴¹ The restriction in the 2010 Defense Authorization Act, applies through December 31, 2010, but only to the use of funds appropriated to the Department of Defense. In contrast, such restrictions in the 2010 Homeland Security, Interior Department, Consolidated Appropriations, and Defense Appropriations Acts appear to apply to all federal funds, but only during the 2010 fiscal year (October 1, 2009-September 30, 2010).⁴² Congress did not appropriate funds for FY2011 before the 2010 fiscal year ended. However, Congress enacted continuing resolutions generally extending funding for federal agencies at the FY2010 enacted spending levels through December 18, 2010, under the authority and conditions provided for under those FY2010 appropriations acts.⁴³ Accordingly, restrictions contained in FY2010 measures concerning the use of appropriations to transfer or release Guantanamo detainees remain in effect. As discussed later, the House-passed Full-Year Continuing Appropriations Act, 2011 (H.R. 3082), a full-year continuing resolution covering all twelve of the FY2011 regular appropriations, would impose more stringent restrictions on detainee transfers.

Other Relevant Provisions of Enacted Laws

Provisions of enacted measures other than those restricting detainees' transfer or release may also have significant implications for persons held at Guantanamo. First, Title XVIII of the 2010 National Defense Authorization Act (P.L. 111-84), the Military Commissions Act of 2009, establishes new procedures governing military commissions, which may be used to try detainees

⁴⁰ Whenever possible, courts interpret two potentially conflicting provisions so as to give effect to both provisions, rather than interpret one as impliedly repealing the other. *See* *Watt v. Alaska*, 451 U.S. 259, 267 (1981). This rule is especially compelling here, where the potentially conflicting statutes were enacted during the same session or, in the case of the Homeland Security and Defense Authorization bills, on the same day. *See* *Pullen v. Morgenthau*, 73 F.2d 281 (2d Cir. 1934). For more information regarding statutory interpretation principles, see CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by Larry M. Eig.

⁴¹ *See* P.L. 111-32, § 14103 (referring throughout to "funds made available in *this or any prior Act*") (emphasis added); Legislative Branch Appropriations Act, 2010, P.L. 111-68, § 115 (extending the § 14103 provisions).

⁴² In appropriations acts, the phrase "or any other act" is typically interpreted as applying to any appropriation for the same fiscal year as the act in question. *See* *Williams v. United States*, 240 F.3d 1019, 1063 (Fed. Cir. 2001) ("[T]he words 'or by any other Act' ... are not words of futurity; they merely refer to any other appropriations act for the same fiscal year.") (citations omitted). The relevant provisions in P.L. 111-83, P.L. 111-84, P.L. 111-117, and P.L. 111-118 restrict the use of funds appropriated by those "or any other act[s]." Thus, the restrictions appear to apply to any funds appropriated for FY2010, but they would not apply to funds appropriated in future fiscal years.

⁴³ Continuing Appropriations Act, 2011 (P.L. 111-242) (extending funding for federal agencies at FY2010 levels through December 3, 2010); P.L. 111-290 (further extending funding through December 18, 2010).

for violations of the laws of war and specified offenses.⁴⁴ Examples of changes enacted in the measure include a prohibition on the use of evidence elicited by cruel, inhuman, or degrading treatment, without regard to when the statement was made; shifting the burden of proof concerning the admissibility of hearsay evidence to the proponent of such evidence; an extension of the obligation to disclose exculpatory information to include evidence of mitigating circumstances; and a detailed set of procedures regarding the use of classified evidence. Although proposals had been introduced earlier in the 111th Congress that would have abolished military commissions altogether,⁴⁵ Congress has instead opted to pass legislation which preserves the military commission system while amending the statutory framework.

Section 1040 of the 2010 National Defense Authorization Act restricts foreign enemy belligerents captured and held outside the United States from being read the warnings required in the domestic criminal law enforcement context by the Supreme Court decision in *Miranda v. Arizona*.⁴⁶ Applying *Miranda*,⁴⁷ courts generally do not admit defendants' statements at trial unless law enforcement officers first advise them, with the warnings typically beginning with "you have the right to remain silent," of their Fifth Amendment right against self-incrimination.⁴⁸ Section 1040 provides that

no member of the Armed Forces and no official or employee of the Department of Defense or a component of the intelligence community (other than the Department of Justice) may read to a foreign national who is captured or detained outside the United States as an enemy belligerent and is in the custody or under the effective control of the Department of Defense or otherwise under detention in a Department of Defense facility the statement required by *Miranda v. Arizona* ... or otherwise inform such an individual of any rights that the individual may or may not have to counsel or to remain silent consistent with *Miranda v. Arizona*.⁴⁹

⁴⁴ For more information regarding the military commissions, see CRS Report R41163, *The Military Commissions Act of 2009: Overview and Legal Issues*, by Jennifer K. Elsea.

⁴⁵ For example, the Interrogation and Detention Reform Act of 2008, H.R. 591, referring to the "failure of the military commissions system," would abolish the military commission system. Instead, prosecutions would take place in federal civilian courts or in military courts-martial proceedings.

⁴⁶ The section would also require the Secretary of Defense to submit a report within 90 days of the act's enactment. The report would assess how the reading of *Miranda* rights to individuals taken into custody in Afghanistan "may affect: (1) the rules of engagement of the Armed Forces deployed in support of Operation Enduring Freedom; (2) post-capture interrogations and intelligence-gathering activities conducted as part of Operation Enduring Freedom; (3) the overall counterinsurgency strategy and objectives of the United States for Operation Enduring Freedom; (4) United States military operations and objectives in Afghanistan; and (5) potential risks to members of the Armed Forces operating in Afghanistan."

⁴⁷ 384 U.S. 436 (1966).

⁴⁸ Fifth Amendment protections concerning the right against self-incrimination and due process serve as dual bases for exclusion of evidence perceived to be coercive. U.S. Const. amend. V ("No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law"). In the domestic law enforcement practice, interrogations are generally presumed to be coercive unless *Miranda* warnings have been given or an exception to the *Miranda* requirement applies.

⁴⁹ Section 504 of the version of the Intelligence Authorization Act for Fiscal Year 2010 (H.R. 2701) reported in the House, contained a similar prohibition, but the version of the bill enacted into law did not include this restriction. In addition, § 744 of the House-passed version of the Financial Services and General Government Appropriations Act, 2010 (H.R. 3170), "requests the President, and directs the Attorney General, to transmit to each House of Congress ... copies of any portions of all documents, records, and communications in their possession referring or relating to the notification of rights under [*Miranda*] ... to ... detainees in the custody of the Armed Forces of the United States."

Thus, it applies to all foreign nationals captured or detained abroad as enemy belligerents rather than just foreign nationals detained at Guantanamo.⁵⁰ This provision is expressly made inapplicable to the Department of Justice,⁵¹ meaning that agents of the DOJ could potentially read Miranda warnings to persons in military custody. One instance where the DOJ might opt to read Miranda warnings to an enemy belligerent in military custody would be when it intends to bring criminal charges against a detainee in federal civilian court.

Finally, section 1080 of the 2010 National Defense Authorization Act requires, among other things, that the Department of Defense “ensure that each strategic intelligence interrogation of any person who is in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility is videotaped or otherwise electronically recorded.”⁵²

The FY2010 Homeland Security Appropriations Act includes two additional provisions affecting the treatment of Guantanamo detainees. Section 553, which appears to apply beyond the end of the 2010 fiscal year, requires that former detainees be included on the “No Fly List,” “unless the President certifies in writing to Congress that the detainee poses no threat to the United States, its citizens, or its allies.”⁵³ A second provision prohibits the use of funds appropriated under that act to “provide any immigration benefit” to any former Guantanamo detainee, including a visa, admission into the United States, parole into the United States, or classification as a refugee or applicant for asylum.⁵⁴ The prohibition is similar to other proposals introduced during the 111th Congress; however, the other proposals would apply permanently, whereas the prohibition in the Homeland Security Appropriations Act appears to apply only to funds appropriated by that act.⁵⁵

⁵⁰ It is unclear how, if at all, this provision will affect the warning requirement in Article 31 of the Uniform Code of Military Justice, 10 U.S.C. § 831, under which persons subject to the Code who are brought before a court-martial are protected from the use of statements obtained through the use of coercion, unlawful influence, or unlawful inducement. A narrow reading of section 1040 might not encompass the Article 31 warnings because they technically differ from the warnings required by *Miranda*. The provisions of Article 31 relating to compulsory self-incrimination are specifically exempted from applying to military commissions that are established pursuant to the Military Commissions Act, 10 U.S.C. § 948b(d). *See also* CRS Report R41252, *Terrorism, Miranda, and Related Matters*, by Charles Doyle, (discussing, among other things, the application of *Miranda* to the military).

⁵¹ P.L. 111-84, § 1040(a)(2).

⁵² *Id.*, § 1080(a). This section does not require the videotaping or electronic recording of interrogation either in the context of direct combat operations, or in the case of tactical questioning, as defined by the Army Field Manual on Human Intelligence Collector Operations. *Id.*, § 1080(d).

⁵³ P.L. 111-83, § 553(a). The provision amends 49 U.S.C. § 44903(j)(2)(C). Two bills previously introduced in the House would have similarly required that Guantanamo detainees’ names be added to the Transportation Security Administration’s “No Fly List.” *See* A bill to amend title 49, United States Code, to require inclusion on the no fly list certain detainees housed at the Naval Air Station, Guantanamo Bay, Cuba, H.R. 2503, 111th Cong. (2009); Transportation Security Administration Authorization Act, H.R. 2200, 111th Cong. (2009) (House-passed version), at § 405(a).

⁵⁴ P.L. 111-83, § 552(f).

⁵⁵ For example, H.R. 1238 would make an alien detained at Guantanamo “permanently ineligible” for both “admission to the United States for any purpose” and “parole into the United States or any other physical presence in the United States that is not regarded as an admission.” Likewise, S. 1071, the Protecting America’s Communities Act, would amend the Immigration and Nationality Act to prohibit the admission, asylum entry, or parole entry of a Guantanamo detainee into the United States. It would also require that a Guantanamo detainee be detained for an additional six months after the “removal period” if the Secretary of Homeland Security certifies that (1) the detainee “cannot be removed due to the refusal of all countries designated by the [detainee] or under this section to receive the [detainee]”; and (2) “the Secretary is making reasonable efforts to find alternative means for removing the [detainee].” Similarly, the Protection from Enemy Combatants Act, S. 108, would forbid the release by a U.S. court of any “covered alien”—defined as any person who “was detained” at Guantanamo—into the United States. Protection from Enemy Combatants (continued...)

The Intelligence Authorization Act for FY2010 (P.L. 111-259), which was enacted in October 2010, required the Director of National Intelligence to make publicly available, within 60 days of the law's enactment, an unclassified summary of intelligence relating to recidivism rates of current or former Guantanamo detainees, as well as an assessment of the likelihood that such detainees may engage in terrorism or communicate with terrorist organizations.⁵⁶ This report was released on December 7, 2010.⁵⁷

Selected Pending Proposals

Numerous legislative proposals introduced during the 111th Congress address the disposition or treatment of Guantanamo detainees. Early in the Congress, several proposals were introduced that would have required the closure of the Guantanamo detention facility within a specified period.⁵⁸ However, more recent legislative proposals, including enacted legislation discussed earlier in this report, have sought to restrict the transfer or release of Guantanamo detainees into the United States, significantly impacting efforts by the Obama Administration to close the facility. Other proposals introduced during the 111th Congress raise issues not addressed in the enacted or pending authorization and appropriations measures.

(...continued)

Act, S. 108, 111th Cong. (2009). It would also bar the issuance of an immigration visa or the granting of any immigration status that might facilitate a detainee's entry into the United States or continued presence after release from custody. However, S. 108 contains a waiver provision that would allow the President to remove the restriction where doing so would be "consistent with the national security of the United States." S. 1081, includes measures similar to those in H.R. 1238 and S. 108, but it would apply only to non-U.S. citizens who had been determined by a Combatant Status Review Tribunal to be enemy combatants. A bill to prohibit the release of enemy combatants into the United States, S. 1081, 111th Cong. (2009). S. 3708, the Terrorist Detention Review Reform Act, would bar the court-ordered release of a covered individual into the United States, and prohibit the issuance of an immigration visa or the granting of any immigration status that "may permit the covered individual to enter, be admitted, or otherwise be at liberty in the United States." Any detainee ordered released by a *habeas* court would be transferred to the custody of the Department of Homeland Security pending his transfer to a foreign country.

⁵⁶ P.L. 111-259, § 334. The House-passed version of the bill would have required the release of a summary regarding Guantanamo detainees' recidivism to terrorist activities within 30 days of enactment, and would have also required the release of information relating to threats posed by current and former Guantanamo detainees who are ethnic Uighurs. H.R. 2701, §§ 350, 351 (House-passed version). *See also supra* text accompanying footnote 4 (discussing current and former Guantanamo detainees of Uighur ethnicity).

⁵⁷ Office of the Director of National Intelligence, *Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba* (Dec. 2010), available at http://www.dni.gov/electronic_reading_room/120710_Summary_of_the_Reengagement_of_Detainees_Formerly_Held_at_Guantanamo_Bay_Cuba.pdf. The report found that of the 598 detainees transferred out of Guantanamo, the "Intelligence Community assesses that 81 (13.5 percent) are confirmed and 69 (11.5 percent) are suspected of reengaging in terrorist or insurgent activities after transfer."

⁵⁸ By requiring closure of the base within 180 days of enactment, the Interrogation and Detention Reform Act of 2008, H.R. 591, proposed the shortest time frame. The Terrorist Detainees Procedures Act of 2009, H.R. 1315, provided a target date of December 31, 2009, which is slightly sooner than the date set by the President's executive order. Two companion bills, S. 147 and H.R. 374, would require closure within one year. The companion bills' timeline corresponded with the one-year timetable initially set in President Obama's executive order, although the one-year mark set by the bills would track the date of the legislation's enactment. All of these bills also provided corresponding options and restrictions governing the transfer and prosecution of detainees.

Restrictions on Transfer or Release

A few pending proposals would extend the timeline for restrictions on the transfer or release of Guantanamo detainees, or make such restrictions more stringent. The Full-Year Continuing Appropriations Act, 2011 (H.R. 3082), which was passed by the House on December 8, 2010, bars any funds either by it or any prior act from being used:

to transfer, release, or assist in the transfer or release to or within the United States, its territories, or possessions Khalid Sheikh Mohammed or any other detainee who (1) is not a United States citizen or a member of the Armed Forces of the United States; and (2) is or was held on or after June 24, 2009, at the United States Naval Station, Guantanamo Bay, Cuba, by the Department of Defense.⁵⁹

This restriction is broader than those contained in previous enactments. Although earlier appropriations measures contained blanket prohibitions on the use of funds to release Guantanamo detainees into the United States, they still permitted transfers into the country for prosecution or detention during legal proceedings, contingent upon specific reporting requirements being met. In contrast, the restriction on detainee transfers contained in the omnibus bill is absolute; no exception is made that would permit a detainee to be transferred into the United States, its territories, or its possessions for any purpose, including for criminal prosecution. Besides ensuring that, absent subsequent legislative action, no Guantanamo detainee may be transferred into the United States in the 2011 fiscal year, the measure could affect the forum for the criminal prosecution of detainees. Because no civilian court operates at Guantanamo, a detainee held there could only be tried before a military tribunal.

H.R. 5136, the National Defense Authorization Act for FY2011, which was passed by the House in May 2010, would prohibit the funds it authorizes to be appropriated from being used to transfer or release any non-U.S. citizen who was detained at Guantanamo as of January 20, 2009, into the United States or its territory or possessions.⁶⁰ Unlike the restrictions imposed by the FY2010 National Defense Authorization Act, H.R. 5136 does not include any exceptions to its prohibition on the use of funds to transfer a detainee to the United States. Additional provisions in H.R. 5136 establish certification requirements for transfers to foreign countries, and also, subject to waiver by the Secretary of Defense, limit funds from being used to transfer a detainee to a foreign country when there has been a confirmed case in which a former Guantanamo detainee was transferred to that country and subsequently engaged in terrorist activity.⁶¹ The House-passed version of H.R. 5136 would also prohibit the use of funds to construct or modify facilities to

⁵⁹ H.R. 3082, § 1116 (amended version approved by House on Dec. 8, 2010).

⁶⁰ National Defense Authorization Act for Fiscal Year 2011, H.R. 5136, 111th Cong. (2010), at § 1032. *See also* **Table A-1** in the **Appendix** to this report. S. 3454, a version of the FY2011 National Defense Authorization Act introduced in the Senate and reported out of committee, would extend the restrictions on detainee transfers established by the FY2010 National Defense Authorization Act until December 31, 2011. A second provision in the Senate committee bill would place a one-year restriction on the use of Department of Defense funds to transfer Guantanamo detainees to five specified countries “where al Qaeda has an active presence,” namely, Afghanistan, Pakistan, Saudi Arabia, Somalia, and Yemen. S. 3454, § 1044. However, in September 2010, a motion to proceed on consideration of the bill by the Senate failed, though it remains possible that the bill will be reconsidered at a later date.

⁶¹ H.R. 5136, § 1033 (House-passed version). Other bills would also impose restrictions on the transfer of detainees to countries that either sponsor terrorism or have served as a safe haven for terrorist groups. *See* H.R. 4490.

house transferred detainees in the United States for the purposes of detention or imprisonment while in the custody or under the effective control of the Department of Defense.⁶²

The House-passed Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2011 (H.R. 5822) would not directly restrict the transfer or release of Guantanamo detainees into the United States, but it would bar the funds it appropriates or makes available to the Department of Defense from being used to renovate or construct a facility within the continental United States to house Guantanamo detainees.⁶³ The House-passed continuing resolution for FY2011 would similarly bar the Department of Justice from using any funds to acquire any facility for use, wholly or in part, in the detention of persons formerly interned at Guantanamo.⁶⁴

Congressional Oversight Provisions

In addition to provisions restricting the transfer or release of detainees, some legislative proposals include provisions requiring the submission of reports to Congress, or the release of information to the public, on specified topics affecting detainees.

The House-passed version of the FY2011 defense authorization bill (H.R. 5136) contains a reporting requirement relating to detainees' legal representation. It would require the Department of Defense's Inspector General to "conduct an investigation of the conduct and practices" of attorneys who represented non-citizen Guantanamo detainees in *habeas corpus* or military commission proceedings.⁶⁵ The Inspector General would be required to submit a report of the findings to the House and Senate Armed Services Committees within 90 days of the bill's enactment.

Detainee Treatment

Several bills introduced in the 111th Congress address the interrogation or treatment of persons detained at the Guantanamo detention facility or elsewhere. The House-passed version of H.R. 5136, the National Defense Authorization Act for FY2011, would prohibit the use of funds appropriated under the act or otherwise made available to the DOD from being used in violation of § 1040 of the 2010 National Defense Authorization Act, which generally prohibited Armed Forces members or DOD officials from reading Miranda warnings to foreign nationals captured or detained outside the United States as enemy belligerents.⁶⁶

Two bills introduced early in the 111th Congress, S. 147 and H.R. 374, propose that interrogations of all persons in custody of U.S. intelligence agencies be conducted in accordance with the U.S.

⁶² *Id.* at § 1034.. Additional bills, including, *inter alia*, H.R. 4441 and S. 370, would similarly restrict the use of federal funds, without exceptions, to (1) transfer a Guantanamo detainee "to any military or prison installation located in the United States"; or (2) "build, modify, or enhance any facility in the United States for the purpose of housing" Guantanamo detainees.

⁶³ H.R. 5822, § 516 (House-passed version).

⁶⁴ H.R. 3082, § 2210 (amended version approved by House on Dec. 8, 2010).

⁶⁵ National Defense Authorization Act for Fiscal Year 2011, H.R. 5136, 111th Cong. (2010)(House-passed version), at § 1037.

⁶⁶ National Defense Authorization Act for FY2011, H.R. 5136, 111th Cong. (2010) (House-passed version), § 1038.

Army Field Manual.⁶⁷ Such legislation would foreclose the possibility, left open in President Obama's executive order on interrogation, that techniques other than those in the Army Field Manual could eventually be deemed appropriate for use by agencies outside the military.⁶⁸

A few bills would restrict detainees' access to public benefits or medical facilities. H.R. 2338 would make those detained at Guantanamo as of the bill's enactment and subsequently transferred to the United States "permanently ineligible" for specified federal, state, or local benefits.⁶⁹ Another bill, H.R. 1042, prohibits the provision of medical treatment to Guantanamo detainees in any facility where members of the armed forces also receive treatment or in any facility operated by the Department of Veteran's Affairs.⁷⁰ To the extent that H.R. 1042 would result in withholding medical care, it is possible that it would raise legal concerns regarding U.S. compliance with treaty obligations.⁷¹

Executive and Judicial Authorities

Several other bills address broad issues related to judicial authority to review *habeas corpus* petitions or to executive authority to detain enemy belligerents or prosecute detainees. Some bills would restrict the Department of Justice's use of federal funds to conduct prosecutions of Guantanamo detainees or others with possible ties to the 9/11 terrorist attacks. For example, S. 2795 and H.R. 4542 would prohibit the use of such funds by the Department of Justice to prosecute Guantanamo detainees in criminal courts in the United States or its territories or possessions.⁷² Although the bills do not define the term "criminal court," it is likely that it would extend to prosecutions in both Article III courts and in any military commissions that may be established in the United States. This funding restriction would not appear to preclude the Department of Defense from prosecuting detainees before military tribunals. Companion bills, S. 2977 and H.R. 4556, may apply to individuals other than Guantanamo detainees. They would prohibit the Department of Justice's use of federal funds to commence or continue the prosecution in an Article III court of any individual who: is suspected of "planning, authorizing, organizing, committing, or aiding the attacks on the United States and its citizens that occurred on September 11, 2001"; is not a citizen of the United States; and is subject to proceedings before a military

⁶⁷ Lawful Interrogation and Detention Act, H.R. 374, 111th Cong. (2009); Lawful Interrogation and Detention Act, S. 147, 111th Cong. (2009).

⁶⁸ Executive Order 13491, *supra* footnote 8.

⁶⁹ No Welfare for Terrorists Act of 2009, H.R. 2338, 111th Cong. (2009). The provision would presumably apply even if a court determined a detainee to have been wrongfully held.

⁷⁰ To prohibit the provision of medical treatment to enemy combatants detained by the United States at Naval Station, Guantanamo Bay, Cuba, in the same facility as a member of the Armed Forces or Department of Veterans Affairs medical facility, H.R. 1042, 111th Cong. (2009).

⁷¹ Treatment of wartime detainees in the conflict with al Qaeda and the Taliban is primarily governed by the Detainee Treatment Act of 2005 and Common Article 3 of the Geneva Conventions. Pursuant to the Detainee Treatment Act of 2005, all persons in the custody or control of the U.S. military (including Guantanamo detainees) must be treated in accordance with Army Field Manual requirements. Section 1002 of P.L. 109-148 requires the Department of Defense to follow the Army Field Manual for intelligence interrogation. *See* Department of the Army Field Manual 2-22.3 (FM 34-52), Human Intelligence Collector Operations (2006). Under Common Article 3, detainees must be treated humanely and protected from "violence to life and person," "cruel treatment and torture," and "outrages upon personal dignity, in particular, humiliating and degrading treatment." "Common Article 3" refers to the third article in each of the 1949 Geneva Conventions. The U.S. Supreme Court determined that, at a minimum, Common Article 3 applies to persons captured in the conflict with al Qaeda. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁷² Stopping Criminal Trials for Guantanamo Terrorists Act of 2009, S. 2795, 111th Cong. (2009); Stopping Criminal Trials for Guantanamo Terrorists Act of 2010, H.R. 4542, 111th Cong. (2010).

commission.⁷³ An alternative proposal, H.R. 4588, would affirmatively require that Guantanamo detainees be tried only in military commissions.⁷⁴

Several proposals would reaffirm or extend executive authority to detain persons associated with U.S. operations against al Qaeda, the Taliban, and other entities. S. 3707, the Terrorist Detention Review Reform Act, would “reaffirm” the President’s authority “to detain unprivileged enemy belligerents in connection with the continuing armed conflict with al Qaeda, the Taliban, and associated forces, regardless of the place of capture, until the termination of hostilities.” The bill would also establish jurisdiction, venue, and procedures for *habeas corpus* challenges raised by persons detained as “unprivileged enemy belligerents” at Guantanamo or other locations who are subject to the *habeas* jurisdiction of the federal courts. Similar authorities would be provided by Enemy Combatant Detention Review Act of 2009 (H.R. 630). Another bill, the Protecting America’s Communities Act (S. 1071), contains a similar provision concerning the President’s authority to detain persons in the conflict with al Qaeda and the Taliban. These provisions would perhaps broaden the President’s authority to preventively detain enemy belligerents as part of post-9/11 military operations. In *Hamdi v. Rumsfeld*, the Supreme Court held that the 2001 Authorization to Use Military Force authorized the President to preventively detain enemy combatants captured during hostilities in Afghanistan but did not address whether such authority extends to captures made in other locations.⁷⁵ The aforementioned bills would appear to expressly authorize the detention of persons captured away from the Afghan zone of combat.

The Terrorist Detainees Procedures Act of 2009, H.R. 1315, would likewise grant exclusive jurisdiction over *habeas* challenges to the U.S. District Court in the District of Columbia and stay pending *habeas* cases.⁷⁶ However, in contrast to H.R. 630, it would stay *habeas* proceedings not to facilitate trials before military commissions but to await the outcome of status review hearings held by panels of military judges. In addition, the time period in which judges would render decisions in the status review process would be sharply limited—to 120 days from the legislation’s enactment for all detainees, unless a military judge extends that date for good cause.

Finally, several House resolutions would possibly facilitate greater congressional oversight. Namely, H.Res. 920, H.Res. 922, and H.Res. 923 would require or request the transmittal to the House of Representatives of relevant documents or information in the possession of the Attorney General, Secretary of Homeland Security, and the President, respectively, relating to Guantanamo detainees. In each case, the request or direction includes a 14-day timeline for transmittal.

Conclusion

Soon after taking office, President Obama issued an executive order to effectuate the closure of the Guantanamo detention facility within a year. The announced deadline for closing the facility has not been met, arguably in part because of a series of congressional enactments limiting executive discretion to transfer or release detainees into the United States. Congress has passed numerous measures which suggest strong opposition to the possibility that a detainee might be

⁷³ A bill to prohibit the use of Department of Justice funds for the prosecution in Article III courts of the United States of individuals involved in the September 11, 2001, terrorist attacks, S. 2977/H.R. 4556, 111th Cong. (2010).

⁷⁴ Detainee Trials at Gitmo Act, H.R. 4588, 111th Cong. (2010).

⁷⁵ 542 U.S. 507 (2004).

⁷⁶ Terrorist Detainees Procedures Act of 2009, H.R. 1315, 111th Cong. (2009).

released into the United States, even if he is found not to have been an enemy belligerent. Until recently, Congress had been less resistant to the possibility of transferring detainees into the United States for criminal prosecution, provided that the Executive first provides Congress with a risk assessment and other information relating to the proposed transfer. However, recent legislative activity involves measures which would bar the transfer of detainees to the United States for any purpose, including criminal prosecution. If enacted, these measures would likely ensure that the Guantanamo detention facility remains open for the foreseeable future. Moreover, such measures would appear to make military tribunals the only forum by which Guantanamo detainees could be tried for criminal offenses, as no civilian court operates within Guantanamo.

Other changes effected by legislation enacted in the 111th Congress, such as the establishment of new military commission procedures, may also significantly impact the treatment and disposition of Guantanamo detainees. These and pending proposals are likely to inform future legislative debates regarding the treatment and rights of detainees at Guantanamo and elsewhere.

Appendix. Comparison of Provisions Restricting Transfer or Release

Table A-1. Provisions Restricting the Use of Funds to Transfer or Release Guantanamo Detainees into the United States

	P.L. 111-32	P.L. 111-83	P.L. 111-84	P.L. 111-88	P.L. 111-117	P.L. 111-118	H.R. 3082 (version agreed to by House on 12/08/10)	H.R. 5136 (passed by House on 5/28/10)
Restricted funds	Federal funds appropriated in “this or any prior Act”	Federal funds appropriated in “this or any other Act”	Department of Defense funds (restriction applies 10/1/09-12/31/2010)	Federal funds appropriated in “this or any other Act”	Federal funds appropriated in “this or any other Act”	Federal funds appropriated in “this or any other Act”	Federal funds appropriated in “this or any prior Act”	Funds authorized to be appropriated “by this Act”
Geographic scope for funds limitation	United States	United States and specified territories	United States and its territories and possessions	United States and specified territories	United States and specified territories	United States and specified territories	United States and its territories and possessions	United States and its territories and possessions
Exception to limitation on use of funds for transfer or release (all require fulfillment of reporting requirement)	Permits transfer for purpose of prosecution or detention during legal proceedings	Permits transfer for purpose of prosecution or detention during legal proceedings	Transfer (apparently for purpose of prosecution or continued detention, but not for release)	Permits transfer for purpose of prosecution or detention during legal proceedings	Permits transfer for purpose of prosecution or detention during legal proceedings	Permits transfer for purpose of prosecution or detention during legal proceedings	No exception (restriction applies to the transfer or release into the United States of non-citizen detainees held at Guantanamo on or after June 24, 2009)	No exception (restriction applies to the transfer or release into the United States of non-citizen detainees held at Guantanamo as of January 20, 2009)

	P.L. 111-32	P.L. 111-83	P.L. 111-84	P.L. 111-88	P.L. 111-117	P.L. 111-118	H.R. 3082 (version agreed to by House on 12/08/10)	H.R. 5136 (passed by House on 5/28/10)
Reporting requirements (prior to transfer to United States)	Report submitted to Congress 45 days prior to transfer; classified; five requirements (includes certification of notification to state officials 14 days prior to such transfer)	Report submitted to Congress 45 days prior to transfer; seven requirements (includes certification of notification to state officials 14 days prior to such transfer)	Report submitted to congressional defense committees 45 days prior to transfer; seven requirements (includes summary of “consultation” with state officials)	Report submitted to Congress 45 days prior to transfer; seven requirements (includes certification of notification to state officials 14 days prior to such transfer)	Report submitted to Congress 45 days prior to transfer; seven requirements (includes certification of 14-day notification to state officials)	Report submitted to Congress 45 days prior to transfer; seven requirements (includes certification of notification to state officials 14 days prior to such transfer)	n/a	n/a

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